

November 17, 2000

Mr. Vernon A. Williams  
Secretary  
Surface Transportation Board  
Suite 100  
1925 K Street, N.W.  
Washington, DC 20423

**ENTERED**  
Office of the Secretary

NOV 17 2000

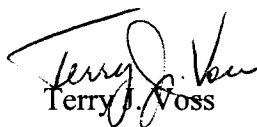
Part of  
Public Record

Re: Ex Parte No. 582 (Sub-No. 1), Major Rail Consolidation Procedures

Dear Secretary Williams:

Enclosed for filing are a signed original and 25 copies of the comments of Ag Processing Inc. Also enclosed is a floppy disk in WordPerfect format containing the text of the comments.

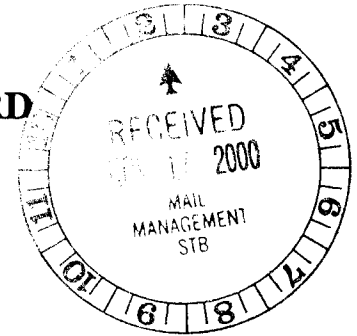
Sincerely,

  
Terry J. Voss

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**



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**EX PARTE NO. 582 (SUB-NO. 1)**

**MAJOR RAIL CONSOLIDATION PROCEDURES**

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**COMMENTS OF AG PROCESSING INC IN RESPONSE TO  
NOTICE OF PROPOSED RULEMAKING**

**Terry J. Voss  
Senior Vice President  
Transportation  
Ag Processing Inc  
Post Office Box 2047  
Omaha, NE 68103-2047  
(402) 498-5579**

**Dated: November 17, 2000**

**BEFORE THE**  
**SURFACE TRANSPORTATION BOARD**

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**EX PARTE NO. 582 (SUB-NO. 1)**  
**MAJOR RAIL CONSOLIDATION PROCEDURES**

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**COMMENTS OF AG PROCESSING INC IN RESPONSE TO**  
**NOTICE OF PROPOSED RULEMAKING**

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**I.**

These comments in response to the Board's October 3, 2000 Notice of Proposed Rulemaking ("Notice" or "NPR") are submitted by Ag Processing Inc ("AGP"), a regional cooperative owned by 285 local cooperatives and over 300,000 farmers and ranchers. AGP is a diversified cooperative operating nine soybean processing plants in Midwestern states, four vegetable oil refineries, a soyflour facility, one corn processing plant, several feed mills throughout the Midwest and eastern U.S. and Canada, and several grain elevators in the upper Midwest. AGP ships or receives agricultural

commodities and products via every Class I and regional railroad in the U.S., and via many shortline railroads. AGP filed comments in response to the Board's Advance Notice of Proposed Rulemaking ("ANPR") in this proceeding. The ANPR comments of Ag Processing are summarized in Appendix N to the Notice.

## II.

The NPR offers a new policy for Class I rail mergers that emphasizes the goal of "enhanced competition" to counter-balance negative merger impacts. AGP regards enhanced competition as a highly necessary goal, but views the NPR as wanting because it does not sufficiently elaborate the measures that would satisfy the "enhanced competition" criterion.

Unfortunately, the NPR devotes scant verbiage to explanations of the choices made by the Board between the various specific proposals offered at the ANPR stage and the Board's own choice of proposed rules in the Notice. The NPR does contain several repetitions of the Board's stated preference for private sector solutions, but little in the way of logical explanations for choices made between competing ANPR proposals. AGP regards itself at a disadvantage for having to speculate at the reasons behind the proposed rules and for the choices made by the Board.

## III.

In AGP's view, one of the greatest weaknesses of the NPR is its failure to recognize and remedy adequately that loss of market access which has followed all recent mergers and is likely to

follow any future mergers. As explained in the ANPR comments of AGP, other shippers, and shipper organizations, it is literally axiomatic that merging carriers, by limiting rate options, failing to quote rates over gateways, and by other devices, foreclose market access to producers of goods and limit and restrict production origination choices for buyers of goods. Following a merger, AGP has found that carriers refuse to offer rates and service where the traffic does not both originate and terminate on their lines, even though we had these options prior to a merger. AGP's experience and observations were not unique; they were mirrored by the ANPR statements of other shippers and shipper organizations. See NPR, Appendix N, sheet 317 (Bunge Corporation); Appendix N, sheet 309 (The Fertilizer Institute); Appendix K, sheet 243 (National Industrial Transportation League); Appendix N, sheet 310 (National Grain and Feed Association). Rail mergers indisputably have had the distinctly anticompetitive consequence of restricting producers to destination markets served by their originating carrier and restricting buyers to origins likewise served by their originating carrier. Mergers have eliminated options for both the buyer and seller as the railroad now controls the marketing.

Despite the numerous references to this merger-related result, the NPR offers no clear hope that such market curtailments will be cured through the new requirement of "enhanced competition." Indeed, there is not even an explanation of why the NPR overlooks

this issue, addressed by so many shippers directly or through their trade associations.

The Board does recognize that "additional consolidation in the industry is also likely to result in a number of anticompetitive effects, such as loss of geographic competition, that are increasingly difficult to remedy directly or proportionately (NPR at 16). On the same page, however, the Board states that the "geographic competition" it has in mind is the "benefit from having another carrier nearby" that extends to "shippers who are served by a single rail carrier." While AGP agrees that, as mergers drive competitive rail lines further and further apart geographically, the pursuit of geographic competition through devices such as build-outs does, indeed, become more difficult. However, it does not follow that all methods of enhancing competition likewise become more difficult. To the contrary, they become all the more necessary.

#### IV.

Stating that it "do[es] not want to limit the approaches that could be proposed to enhance competition" (proposed § 1180.1(c) discussion), the NPR does indicate that three competition-enhancing measures will be required of all applicants: they "shall also explain how they would at a minimum preserve competitive options such as those involving the use of major existing gateways, build-outs or build-ins, and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right

separately to pursue relief for the remainder of the movement." (Proposed § 1180.1(c)(2)(i)).

AGP wishes to focus on one of these provisions: the requirement that the "applicants ... present an effective plan to keep open major existing gateways" (ibid, explanation).

The APR lacks any explanation of how merging carriers would be expected or required to keep major gateways open. Many of the parties that suggested "open gateway" conditions in their ANPR statements urge the Board to make clear that a gateway would not be considered "open" unless it was both physically and economically open. See, e.g., the NPR summaries of the ANPR statements of AGP, Bunge Corporation, The Fertilizer Institute, National Grain and Feed Association, and National Industrial Transportation League. Some of these parties suggested that the widespread elevation of rates on a merged system for gateway traffic would have the effect of embargoing the movement of that traffic onto or from a merged system, and should be limited by imposing a requirement against rate increases over existing gateways that are higher than system increases for similar traffic. The Board, however, adopted no such test for requirement, choosing instead to leave it to the merger applicants to explain how they would keep gateways open.

AGP believes that the final rules should, at a minimum, make clear that a gateway will not be considered "open" if its use is foreclosed by rate actions. Whether, in any given instance, the disuse of a gateway is attributable to a rate action, and not to other market conditions, would be a question of fact. But, if the

Board does nothing more than require the maintenance of an interchange switch to meet the "open gateway" requirement, and then allows the gateway to be closed through rate adjustments, the "open gateway" requirement will be a sham.<sup>1/</sup>

V.

AGP would like to comment on one other aspect of the NPR, and that is with respect to proposed § 1180.1(i) and (j). These sections deal with the "cumulative impact" of mergers, and require the applicants "to measure [the] benefits [of their proposed merger] in light of the anticipated downstream mergers" that may follow.

The Board has acknowledged repeatedly that it has broad conditioning authority under Section 11324. In its final rules, it should state unequivocally that it will, in any merger subject to the proposed rules, reserve the right to use that conditioning authority in the event that a "downstream" merger changes competitive relationships. If, for example, a transaction between

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<sup>1/</sup> An interpretation of the "open gateway" condition which would simply require that an interchange be kept in place and would relegate dissatisfaction with post-merger rate adjustments that deter gateway movement to regulatory proceedings attacking maximum rate reasonableness will defeat the purpose of the open gateway requirement. A gateway should be "open" to all traffic, and not just to that traffic which moves at rates that are subject to the Board's maximum rate jurisdiction. It is just as important to "enhance competition" with respect to traffic moving at, say, 170 percent of variable costs as it is for traffic moving at 200 percent of variable costs. If traffic is moving over an existing pre-merger gateway at 170 percent of variable costs, there is no reason why it should not be able to continue to move over that gateway if the objective of an open gateway provision is to enhance competition.



carriers B and N is before the Board, the Board's rules should provide that the Board may find it necessary to revise the conditions imposed in that transaction should a later transaction between other carriers negatively impact competition.

While this approach may be novel, it is warranted. With so few Class I railroads left, any initial combination coming before the Board under the proposed rules would not be subject to an unlimited array of subsequent merger possibilities; yet, the Board would be powerless to require any subsequent combination to be placed before it in time for simultaneous consideration with a pending matter.<sup>2/</sup>

If the initial applicants are placed on notice that the Board reserves the right to impose further conditions to enhance competition in the light of any subsequent merger transactions that may be proposed and approved, then the initial applicants would have the right to determine whether or not to consummate a merger so conditioned, or to delay its consummation in order to find out what conditions might ultimately be attached as a result of a later transaction that had not procedurally "caught up" with the first transaction. In the absence of consensual retroactivity of this nature, the Board would have only two options: it would either have to deny the initial merger because of uncertainty regarding the consequences of the next merger to come before it, or it would have to grant the first merger regardless of the downstream

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<sup>2/</sup> Section 11325 imposes decisional time constraints on the Board.

consequences of that merger. If the Board takes the latter approach, then its examination of downstream consequences would appear to be an exercise in futility. Therefore, proposed § 1181 should be changed to place applicants on notice that the Board will reserve a retroactive conditioning power dependent on the implementation of "downstream" mergers.

Respectfully submitted,

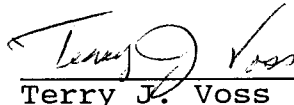


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Dated: November 17, 2000

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing pleading has been served, by first class mail, postage prepaid, on all parties of record this 17th day of November, 2000.



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Terry J. Voss